Supreme Court, U. S.
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In The

Supreme Court of the United States

October Term, 1979

No. 79-1948

WINNEBAGO TRIBE OF NEBRASKA,

Petitioner,

vs.

COL. JAMES W. RAY, DISTRICT ENGINEER, OMAHA DISTRICT, UNITED STATES ARMY, CORPS OF ENGINEERS, IOWA PUBLIC SERVICE COMPANY, AND NEBRASKA PUBLIC POWER DISTRICT,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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Respondents.

———o———

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE EIGHTH CIRCUIT

———o———

To the Honorable, The Chief Justice and the Associate Justices of the Supreme Court of the United States:

The Winnebago Tribe of Nebraska, the Petitioner herein, prays that a Writ of Certiorari issue to review the judgment of the Court of Appeals of the Eighth Circuit entered in the above entitled case on March 13, 1980.

———o———

OPINIONS

The opinion of the Court of Appeals for the Eighth Circuit is unreported, but is attached to this petition as Appendix A, infra, page App. 1. The Court of Appeals affirmed the United States District Court for the District of Nebraska, whose opinion was entered on June 29, 1979, and is unreported, but is attached to this petition as Appendix B, infra, page App. 13.

JURISDICTION

The judgment of the Circuit Court of Appeals for the Eighth Circuit (Appendix A, infra, page App. 1), was entered on March 13, 1980. Jurisdiction of the Supreme Court is invoked under Section 28, U. S. C. § 1254 (1).

QUESTIONS PRESENTED

1. Did the United States Army Corps of Engineers violate the National Environmental Policy Act of 1969 (NEPA), 42 U. S. C. § 4321 *et seq.*, the Council on Environmental Quality (CEQ) guidelines, and its own regulations when it issued a river crossing permit making possible the construction of a 66-mile, high-voltage, electric transmission line without reviewing the environmental effects of 98% of that line.
2. Did the Winnebago Tribe of Nebraska meet its burden of demonstrating a substantial environmental issue as to the endangered Northern American Bald Eagle at trial?

STATUTORY PROVISIONS AND REGULATIONS INVOLVED

This case involves the National Environmental Policy Act of 1969, 42 U. S. C. § 4332 (1976):

> § 4332. Cooperation of agencies; reports; availability of information; recommendations; international and national coordination of efforts.
>
> The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all agencies of the Federal Government shall—
>
> (A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment;
>
> (B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by sub-chapter II of this chapter, which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations;
>
> (C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—
>
> (i) the environmental impact of the proposed action.
>
> (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented.

(iii) alternatives to the proposed action.

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of title 5, and shall accompany the proposal through the existing agency review processes;

the Rivers and Harbors Appropriation Act of March 3, 1899, ch. 425, § 10, 30 Stat. 1151, Title 33, U. S. C. § 403 (1976):

§ 403. Obstruction of navigable waters generally; wharves; piers, etc.; excavations and filling in.

The creation of any obstruction and affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of the Army; and it shall not

> be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor or refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army prior to beginning the same.
>
> (Mar. 3, 1899, ch. 425, § 10, 30 Stat. 1151.);

the Council on Environmental Quality (CEQ) regulations, 40 C. F. R. § 1500.5(a)(2) (1978):

> § 1500.5 Types of actions covered by the Act.
>
> (a) "Actions" include but are not limited to:
>
> • • •
>
> (2) New and continuing projects and program activities: Directly undertaken by Federal agencies; or supported in whole or in part through Federal contacts, grants, subsidies, loans, or other forms of funding assistance (except where such assistance is solely in the form of general revenue sharing funds, distributed under the State and Local Fiscal Assistance Act of 1972, 31 U. S. C. 1221 et seq. with no Federal agency control over the subsequent use of such funds); or involving a Federal lease, permit, license certificate or other entitlement for use;

the CEQ regulations, 40 C. F. R. § 1500.6 (a) (1978):

> § 1500.6 Identifying major actions significantly affecting the environment.
>
> (a) The statutory clause "major Federal actions significantly affecting the quality of the human environment" is to be construed by agencies with a view to the overall, cumulative impact of the action proposed, related Federal actions and projects in the area, and further actions contemplated. Such actions

> may be localized in their impact, but if there is potential that the environment may be significantly affected, the statement is to be prepared. Proposed major actions, the environmental impact of which is likely to be highly controversial, should be covered in all cases. In considering what constitutes major action significantly affecting the environment, agencies should bear in mind that the effect of many Federal decisions about a project or complex of projects can be individually limited but cumulatively considerable. This can occur when one or more agencies over a period of years puts into a project individually minor but collectively major resources, when one decision involving a limited amount of money is a precedent for action in much larger cases or represents a decision in principle about a future major course of action, or when several Government agencies individually make decisions about partial aspects of a major action. In all such cases, an environmental statement should be prepared if it is reasonable to anticipate a cumulatively significant impact on the environment from Federal action. The Council, on the basis of a written assessment of the impacts involved, is available to assist agencies in determining whether specific actions require impact statements;

the CEQ regulations, 40 C. F. R. § 1508.18 (1979):

> § 1508.18 Major Federal action.
>
> "Major Federal action" includes actions with effects that may be major and which are potentially subject to Federal control and responsibility. Major reinforces but does not have a meaning independent of significantly (§ 1508.27). Actions include the circumstance where the responsible officials fail to act and that failure to act is reviewable by courts or administrative tribunals under the Administrative Procedure Act or other applicable law as agency action;

the United States Army Corps of Engineers regulation, 33 C. F. R. § 209.410 (d) (2) (ii) (1978):

(ii) Should the District Engineer determine in assessing the impact of a minor action that an environmental statement is not required, the determination to that effect will be placed in the project file. This determination shall be made available to the public upon request and shall include a statement of the facts and the signer's basis and reasons for his decision. It will be signed by the District Engineer or higher commander and brought to the atention of the public by publication in the 3-year schedule (paragraph (f) of this section). Where more timely notification is essential, public notices may also be used. A minor action is defined as one which, following the completion of an environmental assessment, is determined not to have a significant impact on the quality of the human environment. If the District or Division Engineer is in doubt as to whether or not a statement should be prepared, further guidance must be requested in accordance with paragraph (d) (4) of this section. These determinations are reversible should controversy or other later events require an environmental statement to be written;

and the United States Army Corps of Engineers regulations, 33 C. F. R. § 325.4 (b) (1) (1978):

(1) The District Engineer, at the earliest practicable time prior to the issuance of the public notice, shall make a preliminary assessment of impacts of the project should it be approved and make a preliminary determination as to whether the quality of the human environment would be significantly affected. This preliminary assessment will normally be based on experience with similar type activities performed in the past. A statement of the District Engineer's preliminary determination shall be included in the public notice. This preliminary determination will be reconsidered as additional information is developed.

———o———

STATEMENT OF THE CASE

The Nebraska Public Power District (NPPD) and the Iowa Public Service Company (IPS) entered into a joint venture for the construction of a 345 kilovolt electric transmission line. The line was to run from the IPS substation in Raun, Iowa, a few hundred yards to the Missouri River, across that river and then more than 65 miles to the NPPD substation in Hoskins, Nebraska. Some 27 miles of that line were to run across the Winnebago Indian Reservation. The line crossed 29 parcels of land owned in whole or in part by the Winnebago Tribe and by individual members of the Tribe.

On July 13, 1978, IPS applied to the United States Army Corps of Engineers (Corps) for a permit to cross the Missouri River, as required by 33 U. S. C. § 403 (1976) (originally enacted as Rivers and Harbors Appropriation Act of March 3, 1899, ch. 425, § 10, 30 Stat. 1151) (hereinafter section 10). The Corps prepared an environmental assessment on the impact of the river-crossing portion of the line (approximately 1.25 miles of 66 miles). The Corps' assessment totally ignored the remaining 98% of the project. The assessment did not mention any possible adverse effect on Northern American Bald Eagles, an endangered species found in the project area. The Corps did not consider a number of viable alternatives.

The Corps granted the section 10 permit on January 10, 1979. On April 30, 1979, the Winnebago Tribe of Nebraska (Tribe) filed suit alleging noncompliance by the power companies and the Corps with the National Environmental Policy Act of 1969, 42 U. S. C. § 4321, *et seq.* (NEPA). The Tribe sought to enjoin construction and

condemnation pending compliance. The suit was brought under 28 U. S. C. §§ 1331 (a), 1361, and 1362 (1976).

At trial the Tribe demonstrated the entire Raun-Hoskins line would not and could not have been built absent the issuance of the section 10 permit allowing the power companies to cross the Missouri. It also demonstrated that the Corps completely ignored the 98% of the proposed project west of the Missouri's banks and did not consider several viable alternatives. The Tribe demonstrated that bald eagles were not considered in the Corps' negative declaration that was the result of its environmental assessment. The Tribe established that there is a substantial bald eagle population in the vicinity of the proposed power line. The Tribe established that there have been dead bald eagles found along the Missouri River and in both Iowa and Nebraska. The Tribe established that the third largest cause of death of bald eagles is electrocution. Impact injuries are the second largest cause of eagle mortality. Some bald eagles which receive these diagnoses are found under power lines. The Tribe established that bald eagles are in danger of extinction. The Tribe proved that power lines kill eagles and that the Corps did not consider this. The Tribe also showed that the clearing of brush adversely effects the habitat of part of the food chain of eagles, that noise during construction would disturb roosting eagles, and that the United States Fish and Wildlife Service has not determined that high voltage power lines are safe for migratory birds.

The District Court ruled against the Tribe by holding that the Tribe failed to meet its burden of proof. The Eighth Circuit affirmed the ruling of the District Court.

Both courts held the Corps action in assessing only a small part of the project was reasonable.

REASONS FOR GRANTING THE WRIT

1. The decision of the Eighth Circuit Court of Appeals in this case conflicts with the en banc holding of the Eighth Circuit in Minnesota Public Interest Research Group v. Butz, 498 F. 2d 1314 (8th Cir. 1974) (en banc) (MPIRG I), with decisions of other circuits, with the guidelines of the Council on Environmental Quality (CEQ), and with the Corps' own regulations.

The decision of the Eighth Circuit Court of Appeals in this case conflicts with *MPIRG I, supra,* decisions from other circuits, Council on Environmental Quality guidelines, and with the Corps' own regulations.

> The National Environmental Policy Act requires that:
> to the fullest extent possible . . . (2) all agencies of the Federal government shall . . . (c) include in . . . major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on . . . (i) the environmental impact of the proposed action . . . (iii) alternatives to the proposed action. 42 U. S. C. § 4332.

> The CEQ guidelines define "actions" to include:
> (2) New and continuing projects . . . involving a Federal lease, permit, license, certificate or other entitlement for use. 40 C. F. R. § 1500.5(a)(2) (1978).

These guidelines are entitled to substantial deference. *Andrus v. Sierra Club,* 99 S. Ct. 2335, 2341 (1979).

In *MPIRG I, supra,* the Eighth Circuit, sitting *en banc,* adopted a unitary test for whether a particular project or federal activity was "major federal action significantly affecting the quality of the human environment." 42 U. S. C. § 4332(2)(c). Other courts of appeal agree with this test. *Calvert Cliffs Coord. Com. v. A. E. C.*, 449 F. 2d 1109 (D. C. Cir. 1971); *City of Davis v. Coleman,* 521 F. 2d 661 (9th Cir. 1975); *Wyoming Outdoor Coord. Council v. Butz,* 484 F. 2d 1244 (10th Cir. 1973).

The CEQ has adopted the unitary test for determining the applicability of NEPA to federal actions. 40 C. F. R. § 1500.6(a) (1978). And see, 40 C. F. R. § 1508.18 (1979), 43 Fed. Reg. 55989 (November 29, 1978). Additionally, the Corps' regulations, in force at the time this permit was issued recognized the unitary test. 33 C. F. R. § 325.4(b)(1) (1978). See also the Corps' definition of minor action at 33 C. F. R. § 209.410(d)(2)(ii) (1978).

Some courts of appeal have bifurcated the statutory phrase and look to see if an action is "federal" and if it is "major" before looking to see if it will "significantly" affect the environment. *Henly v. Mitchell,* 460 F. 2d 640 (2nd Cir. 1972); *N. A. A. C. P. v. Medical Ctr., Inc.,* 585 F. 2d 619 (3rd Cir. 1978); *Save The Bay, Inc., v. Corps of Eng.,* — F. 2d — (5th Cir. 1980); *Scherr v. Volpe,* 466 F. 2d 1027 (7th Cir. 1972).

In this case, the Corps defined "proposed action" to refer only to its issuance of a section 10 permit allowing the power line to cross the river. The Tribe seeks to have this Court delimit "proposed action" by the underlying activity being regulated.

The Corps first narrowed its review of this project to 2% of the 66-mile powerline. The panel which decided this case looked at federal involvement in the unconsidered 98% of the line, concluded there was none and therefore concluded that there was no "major Federal action" and consequently no obligation to review the environmental impacts of the entire line. The Tribe contends that this single project has been federalized in its entirety by the issuance of the section 10 permit and therefore the Corps was obligated to look at the entire line from substation to substation.

The Court's holding is directly contrary to the *en banc* Eighth Circuit holding in *MPIRG I, supra,* the holding of other circuit courts of appeal, the CEQ guidelines, and the Corps' own regulations. The focus should have been on whether the Tribe raised a substantial environmental issue significantly affecting the quality of the human environment concerning the entire line. When the Tribe did so, the issuance of the permit became per se major federal action. *MPIRG I, supra; Sierra Club v. Morton,* 400 F. Supp. 610, 644-645 (N. D. Calif. 1975). It is on this precise point that the conflict amongst the circuits turns.

In effect, the Corps has limited its environmental obligations under NEPA to the physical boundaries of its substantive jurisdiction, essentially the 2% of the powerline extending between the Missouri's banks. The Eighth Circuit panel agreed with this and defined the Corps environmental review responsibility co-terminally with that agency's jurisdictional grant in 33 U. S. C. § 403 (section 10). Also see *United States v. Sexton Cove Estates, Inc.,* 526 F. 2d 1293 (5th Cir. 1976).

In essence then, NEPA's scope is limited by this ruling to the effects of the licensor regardless of the effect of the activities of the licensee permitted by the agency action.

It is the Tribe's position that "major Federal action" must be judged by the activity permitted by the granting of a license or permit. The focus of the Corps in this case should have been upon whether the entire 66 mile powerline substantially affects the quality of the human environment. If it does, then the issuance of the permit making that construction possible is per se major federal action. *MPIRG I, supra*; *Davis v. Morton,* 469 F. 2d 593 (10th Cir. 1972); *Sierra Club v. Morton,* 400 F. Supp. 610, 644-645 (N. D. Cal. 1975).

The inadequacy of the Corps' assessment is clear. It artificially segmented a 66-mile powerline in order to examine 2% of it. It is instructive to examine the three-part test several courts have articulated for defining the scope of an environmental assessment for a highway segment. The segment considered should "at least be independently supportable by meaningful terminal points." *Indian Lookout Alliance v. Volpe,* 484 F. 2d 11, 19 (8th Cir. 1973). The segment should have independent utility. And the segment should be long enough to assure "an adequate opportunity for consideration of the alternatives to the proposed action (both whether and where to build)." *Patterson v. Exon,* 415 F. Supp. 1276, 1282 (D. Neb. 1976). All these criteria are equally appropriate in the transmission line context.

Powerlines have utility for carrying electricity. The electricity can only be used once it reaches a substation.

The only meaningful terminal points for a transmission line are substations. The river bank to river bank environmental assessment provides for no functional review of the line. The line neither begins nor ends at the river's banks. The river crossing segment of the line has no independent utility. See, *Swain v. Brinegar,* 542 F. 2d 364 (7th Cir. 1976) (*en banc*). Alternatives to the river crossing cannot be meaningfully considered unless recognition is given to the underlying activity, which is the construction of a 66-mile powerline. The review conducted by the Corps in this case fails to satisfy any part of this segmentation test. It is very hard to imagine how the Corps could meaningfully consider alternatives without examining the line beyond its river bank to river bank limitation. Presumably, options would be severely limited by the appearance of the ends of the east and west segments of the line, in mid-air, at the points these segments encroached the Corps' jurisdiction. Alternatives cannot be considered, especially the "no action" alternative, when no attention is given to the source of the power, its destination or the effect and method of its transmission.

NEPA requires federal agencies to review the environmental impacts and alternatives to major federal actions significantly affecting the quality of the human environment. This review is to be completed prior to the irretrievable commitment of resources to allow for a meaningful consideration of cost/benefits, alternatives, and mitigation. *Natural Resources Defense Council, Inc. v. Morton,* 488 F. 2d 827 (D. C. Cir. 1972). Under NEPA the scope of review should be "to the fullest extent possible."

To make its examination meaningful, the Corps was obligated to look at the entire Raun-Hoskins line. If the

entire line is looked at, unquestionably the Corps action in permitting the essential step in its construction becomes major Federal action significantly affecting the quality of the human environment. See *Greene County Planning Board v. F.P.C.*, 455 F. 2d 412 (2nd Cir. 1972).

2. The burden of proof imposed upon the Tribe in this case defeats the purpose of NEPA.

As discussed, *supra,* the Corps did not consider 98% of the line. In addition to this failing the Corps totally ignored the effect of the large transmission towers and line upon the Northern American Bald Eagle. There is a substantial population of Bald Eagles in the project area on a seasonal basis. The Bald Eagle is adversely affected by powerlines and power towers.

The Court of Appeals upheld the District Court's holding that the Tribe failed to show that eagles are differently impacted than the robins, ducks, and hawks which were mentioned in the Corps' environmental assessment. But the environmental asssessment did not mention the electrocution hazard which the line poses to Bald Eagles. Further, the loss of one or two robins may be insignificant but the loss of even one Bald Eagle has a significant effect on the quality of the human environment. Bald Eagles are included within the protection of the Endangered Species Act of 1973, 16 U.S.C. §§ 1531-43 (1979), 50 C.F.R. § 17.11 (1978).

The lower courts apparently believe that the Tribe has the burden of establishing that actual injuries will occur to eagles because of this powerline. Although the Tribe believes that it has met this standard, the correct

standard was for the Tribe to demonstrate a deficiency in the administrative record. *Pokorny v. Costle,* 464 F. Supp. 1273 (D. Neb. 1979); *Hiram Clarke Civic Club, Inc., v. Lynn,* 476 F. 2d 421 (5th Cir. 1973); *Hiatt Grain & Feed, Inc. v. Bergland,* 446 F. Supp. 457 (N. D. Ill. 1978). The Tribe has shown three: 98% of the line was completely unconsidered; the Corps gave no consideration to the endangered Bald Eagle; and unconsidered were a number of viable alternatives to the construction of the line.

Once a deficiency in the administrative record has been shown, the burden shifts to the federal agency "which possesses the labor, public resources, and expertise to make the proper environmental assessment and to support it by a preponderance of the evidence." *Pokorny,* at 1276.

To require more of the Tribe would be to insulate the Corps behind an insurmountable barrier. Environmentalists, in bringing NEPA suits, are acting as private attorney generals to preserve our nation's great resources. The cost of experts and research should be borne by the agencies. The Tribe has proven that the Corps did not consider 98% of the proposed action. The Tribe has proven that an endangered species was threatened by the line. The Tribe has proven that viable alternatives were unconsidered. The burden shifted to the Corps to demonstrate the reasonableness of its negative declaration. The Corps did not meet its burden.

3. The scope of the environmental assessment to be made before the United States Army Corps of Engineers issues a permit is a matter of great national importance.

The Corps issues section 10 permits, such as the one at issue in this suit under the authority of section 10 of

the Rivers and Harbors Appropriation Act of March 3, 1899, 33 U. S. C. § 403 (1976). It also issues section 404 permits, combination section 10 and 404 permits, and section 103 permits. The Corps did 16,214 environmental assessments in conjunction with the issuance of permits and letters of permission in fiscal year 1978, ending September 30, 1978. The Corps, in fiscal year 1979, did 15,793 environmental assessments.

Numerous other federal agencies issue permits as well. See *Greene County Planning Board v. Federal Power Commission,* 455 F. 2d 412 (2nd Cir. 1972) (FPC license on high voltage transmission line); *Davis v. Morton,* 469 F. 2d 593 (10th Cir. 1972) (Bureau of Indian Affairs approval of 99 year lease on trust land); *Jette v. Berglund,* 579 F. 2d 59 (10th Cir. 1978) (Department of Agriculture license for drilling); and *State of Maryland v. Train,* 415 F. Supp. 116 (D. Md. 1976) (Environmental Protection Agency ocean dumping permit).

For the above reasons, the Tribe prays that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Eighth Circuit in this case.

Respectfully submitted,

WINNEBAGO TRIBE OF NEBRASKA,
Petitioner

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APPENDIX A

UNITED STATES COURT OF APPEALS

For the Eighth Circuit

No. 79-1632

WINNEBAGO TRIBE OF NEBRASKA,

Appellant,

vs.

COL. JAMES W. RAY, DISTRICT ENGINEER, OMAHA DISTRICT, UNITED STATES ARMY, CORPS OF ENGINEERS, IOWA PUBLIC SERVICE COMPANY, AND NEBRASKA PUBLIC POWER DISTRICT,

Appellees.

Appeal from the United States District Court for the District of Nebraska.

Submitted: November 7, 1979

Filed: March 13, 1980

Before LAY, Chief Judge;* BRIGHT and McMILLIAN, Circuit Judges.

BRIGHT, Circuit Judge.

Winnebago Tribe of Nebraska (the Tribe) appeals an order of the district court[1] denying its request for a permanent injunction to bar construction of a proposed power line running from Ruan, Iowa, to Hoskins, Ne-

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*The Honorable Donald P. Lay became Chief Judge of the Eighth Circuit on January 1, 1980.

1 The Honorable Albert G. Schatz, United States District Judge for the District of Nebraska.

braska. The Tribe claims the district court erred in holding that the issuance of a permit to cross the Missouri River by the Army Corps of Engineers (Corps) was not a "major federal action" within the meaning of the National Environmental Policy Act of 1969 (NEPA), 42 U. S. C. §§ 4321-61 (1976). The Tribe also maintains that, contrary to the district court's holding, it sustained its burden of proof by raising substantial environmental issues. Finally, the Tribe argues that the Corps' determination not to prepare an environmental impact statement (EIS) was unreasonable. For reasons set forth below, we reject these contentions and affirm the holding of the district court.

I. *Background.*

Appellee Nebraska Public Power District (NPPD) began planning construction of a 345 KV transmission line from Raun, Iowa, to Hoskins, Nebraska, in 1975. The proposed line would cross the Missouri River 150 feet south of an Omaha Public Power District (OPPD) line and run through the Winnebago Indian Reservation. In the fall of 1977, NPPD informed the Tribe and the Bureau of Indian Affairs of its intent.

On July 13, 1978, appellee Iowa Public Service Company (IPS), a joint venturer with NPPD in this project, applied to the Corps for a permit to cross the Missouri River, as required by 33 U. S. C. § 403 (1976) (originally enacted as Rivers and Harbors Appropriation Act of March 3, 1899, ch. 425, § 10, 30 Stat. 1151) (hereinafter section 10). Before granting the permit, the Corps prepared an environmental effect assessment on the impact

of the river-crossing portion of the line (approximately 1.25 miles out of 67 miles). The assessment concluded that an environmental impact statement was not required because "[t]here are no significant environmental impacts associated with this project." The assessment did not mention any possible adverse effect on bald eagles, a protected species.[2] The Corps granted the section 10 permit on January 10, 1979.

On April 30, 1979, the Tribe filed the present suit alleging noncompliance with NEPA and seeking to enjoin construction pending compliance. On May 1, 1979, the district court granted a temporary restraining order. In the course of a three-day trial in May, the court heard testimony on the potential harm to the American bald eagle, a portected species, as well as arguments on the sufficiency and scope of the Corps' assessment. The trial court ruled that the assessment properly considered only the river-crossing portion of the line, because the scope of the federal permit was limited to this area and the federal government was not funding the project. After weighing the evidence on danger to the American bald eagle, the district court concluded that the Tribe had failed to raise a substantial environmental issue. Accordingly, the trial court denied the requested injunctive relief.

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2 *See* Bald Eagle Protection Act, 16 U. S. C. A. §§ 668-668d (1974 & West Supp. 1979); Migratory Bird Treaty Act, 16 U. S. C. A. §§ 703-712 (1974 & West Supp. 1979), 50 C. F. R. § 10.13 (1978); Endangered Species Act of 1973, 16 U. S. C. A. §§ 1531-43 (1974 & West Supp. 1979), 50 C. F. R. § 17.11 (1978).

II. *Analysis.*

Section 102(2)(C) of NEPA, 42 U.S.C. § 4322(2)(C) (1976), requires that the relevant federal agency prepare an EIS for "major federal actions significantly affecting the quality of the human environment." Initially, the agency determines whether the proposed action triggers the EIS requirement. *See Minnesota Public Interest Research Group v. Butz,* 498 F. 2d 1314, 1319-20 (8th Cir. 1974) (*en banc*) (*MPIRG I*). In *MPIRG I, supra,* this court set forth the standard for judicial review of an agency's threshold determination not to prepare an EIS:

> To upset an agency determination not to prepare an impact statement, it still must be shown that the agency's determination was not reasonable under the circumstances. This will require a showing that the project could significantly affect the quality of the human environment. Save Our Ten Acres v. Kreger, [472 F. 2d 463, 466 (5th Cir. 1973)]. We therefore hold that review of an agency's determination not to prepare an impact statement should be measured by its reasonableness in the circumstances, not as to whether it was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. [*MPIRG I, supra,* 498 F. 2d at 1320 (footnote omitted); *accord, Monarch Chemical Works, Inc. v. Thone,* 604 F. 2d 1083, 1087-88 (8th Cir. 1979).]

MPIRG I, in requiring that the plaintiff must show "that the project could significantly affect the quality of the human environment," relied upon *Save Our Ten Acres v. Kreger,* 472 F. 2d 463, 466 (5th Cir. 1973) (*SOTA*). In *SOTA* and subsequent cases, the Fifth Circuit elaborated upon the required showing by allocating burdens of proof: the plaintiff must raise a substantial environmental issue concerning the proposed project, and

then the burden shifts to the defendant to support the reasonableness of the negative determination. *See SOTA, supra,* 472 F. 2d at 467; *Hiram Clarke Civic Club, Inc. v. Lynn,* 476 F. 2d 421, 425 (5th Cir. 1973); *Image of Greater San Antonio, Texas v. Brown,* 570 F. 2d 517, 522 (5th Cir. 1978).

In the present suit, the district court assigned appellant the burden of raising a substantial environmental issue. The parties to the present appeal do not take issue with the district court's use of this approach, nor do we find the method inappropriate. A number of district courts throughout the country have employed this analysis. *See Pokorny v. Costle,* 464 F. Supp. 1273 (D. Neb. 1979); *Hiatt Grain & Feed, Inc. v. Bergland,* 446 F. Supp. 457 (D. Kan. 1978), *aff'd* 602 F. 2d 929 (10th Cir. 1979); *Mid-Shiawassee County Concerned Citizens v. Train,* 408 F. Supp. 650 (E. D. Mich. 1976), *aff'd mem.,* 559 F. 2d 1220 (6th Cir. 1977); *Jones v. HUD,* 390 F. Supp. 579 (E. D. La. 1974). Indeed, without commenting on the district court's characterization of the burden of proof, this court has affirmed an opinion that concluded that many of the plaintiff's claims failed to raise a substantial environmental issue. *Monarch Chemical Works, Inc. v. Exon,* 466 F. Supp. 639 (D. Neb.), *aff'd sub nom. Monarch Chemical Works, Inc. v. Thone,* 604 F. 2d 1083 (8th Cir. 1979). Accordingly, we must determine whether the district court erred in holding that the Tribe failed to meet its burden.

To establish a substantial environmental issue, the "[p]laintiff must allege facts [omitted from consideration in the administrative record] which, if true, would constitute a 'substantial' impact upon the environment." *Hiatt*

Grain & Feed, Inc. v. Bergland, supra, 446 F. Supp. at 490 (citations omitted). The alleged deficiency must be of sufficient significance to warrant shifting the burden of proof. *See Monarch Chemical Works, Inc. v. Exon, supra,* 466 F. Supp. at 647-48; *Pokorny v. Costle, supra,* 464 F. Supp. at 1275-77.

The Tribe claims that the administrative record is deficient in three respects: (1) it ignores sixty-five miles of the sixty-seven mile transmission line; (2) it does not consider certain viable alternatives; and (3) it does not contemplate potential harm to bald eagles. We deal with these claims in the order presented.

A. *Failure to consider the Entire Project.*

The Tribe alleges that the administrative record should have considered environmental impacts posed by the entire transmission line, rather than just the river-crossing portion. Appellant's claim presents two related issues: (a) whether the Corps wields such control and responsibility over the entire project that nonfederal segments must be included in the assessment; and (b) assuming limited federal involvement, whether the Corps nevertheless must consider the impacts of nonfederal segments as secondary effects of the proposed action.

The Tribe notes initially that the powerline will not be constructed without the section 10 permit. In light of "but for" veto power, the Tribe argues, the Corps wields sufficient control over the entire project to require project-wide environmental analysis. Factual or veto control, however, must be distinguished from legal control or "enablement." *See NAACP v. Medical Center, Inc.,* 584 F. 2d 619 (3d Cir. 1978) (*Medical Center*);

Atlanta Coalition on the Transportation Crisis, Inc. v. Atlanta Regional Commission, 599 F. 2d 1333 (5th Cir. 1979) (*Atlanta Coalition*).

In "enablement" cases federal action is a legal condition precedent to accomplishment of an entire non-federal project. *Medical Center, supra,* 584 F. 2d at 632-33; *Atlanta Coalition, supra,* 599 F. 2d at 1345-47. Thus, for example, the federal statute at issue in *Greene County Planning Board v. FPC,* 455 F. 2d 412 (2d Cir.), *cert. denied,* 409 U. S. 849 (1972), required the Federal Power Commission to assure that the entire project was "best adapted" to a comprehensive environmental plan before licensing construction of a powerline. *See also Cady v. Morton,* 527 F. 2d 786 (9th Cir. 1975) (the federal grant of Indian coal leases was the legal condition precedent for the strip mining project); *Davis v. Morton,* 469 F. 2d 593 (10th Cir. 1972) (ninety-nine year lease of Indian lands was legal condition precedent to entire development project). The statute at issue in this case is far narrower and cannot be construed as a grant of legal control over the entire project.[3]

The court in *Medical Center, supra,* identified three factors helpful in determining whether "but for" or fac-

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3 Section 10 does not contain the type of broad mandate present in the Federal Power Commission Act. *Compare Greene County Planning Board v. FPC, supra,* 455 F. 2d at 423. The Corps' jurisdiction under section 10 governs non-federal actions only to the extent they "affect the course, condition, capacity or location of [navigable waters] * * *." *United States v. Sexton Cove Estates, Inc.,* 526 F. 2d 1293, 1299 (5th Cir. 1976). *See Weiszmann v. District Engineer, United States Army Corps of Engineers,* 526 F. 2d 1302, 1304 (5th Cir. 1976); *United States v. Joseph G. Moretti, Inc.,* 525 F. 2d 1306 (5th Cir. 1976).

tual control requires project-wide analysis: (1) the degree of discretion exercised by the agency over the federal portion of the project; (2) whether the federal government has given any direct financial aid to the project; and (3) whether "the overall federal involvement with the project [is] sufficient to turn essentially private action into federal action." *Id.* at 629 (citation omitted). In *Medical Center*, the agency had little or no discretion, there was no direct federal aid, and the court found the federal involvement insufficient.

In the present suit, while the Corps has broad discretion to consider environmental impacts (*see Zable v. Tabb*, 430 F. 2d 199 (5th Cir. 1970), *cert. denied*, 401 U. S. 910 (1971)), that discretion must be exercised within the scope of the agency's authority. As noted above, the Corps' jurisdiction under section 10 extends only to areas in and affecting navigable waters. *See United States v. Sexton Cove Estates, Inc.*, 526 F. 2d 1293, 1299 (5th Cir. 1976); *Weiszmann v. District Engineer, United States Army Corps of Engineers*, 526 F. 2d 1302, 1304 (5th Cir. 1976); *United States v. Joseph G. Moretti, Inc.*, 526 F. 2d 1306 (5th Cir. 1976). As the Third Circuit observed in *United States v. Stoeco Homes, Inc.*, 498 F. 2d 597, 607 (3d Cir. 1974):

> The federal environmental protection statutes did not * * * by their terms enlarge the jurisdiction of the Army Corps of Engineers under the Rivers and Harbors Appropriation Act of 1899. If there is no such jurisdiction environmental protection is still a matter primarily of state concern.

Thus, the Corps' discretion under section 10 does not dictate project-wide review.[4]

The factors remaining for consideration under *Medical Center* are the presence of direct federal funding and the degree of federal involvement. There has been no direct or even indirect federal funding for this project. *Cf. Ely v. Velde*, 451 F. 2d 1130 (4th Cir. 1971) (Law Enforcement Assistance Administration involvement in and funding for a state prison amounts to major federal action). As for federal involvement, the fact that part of the line will cross the Winnebago Reservation does not suffice to turn this essentially private action into federal action.[5] Federal law allows the state to condemn this land for any public purpose in the same manner as land owned in fee. 25 U. S. C. § 357 (1976). Thus, we conclude that the Corps did not have sufficient control and responsibility to require it to study the entire project.

The Tribe also notes that an agency must consider secondary or indirect impacts in determining whether

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4 Contrary to the Tribe's claim, the Corps' amended regulations do not appear to make the grant of a section 10 permit a *per se* major federal action. *See* 44 Fed. Reg. 38,292, 38,294, 38,307-12 (1979) (to be codified in 33 C. F. R. § 230.6 (e) and Appendix B to 33 C. F. R. § 230). Moreover, new Council on Environmental Quality regulations, 43 Fed. Reg. 55,978 (1978) (to be codified in 40 C. F. R. §§ 1500-08), as well as amended Corps of Engineers regulations, 44 Fed. Reg. 38,292 (1979) (to be codified in 33 C. F. R. § 230), postdate the assessment here and do not apply. *See* 43 Fed. Reg. 56,002 (1978) (to be codified in 40 C. F. R. § 1506.12).

5 *Cf. Citizens Committee for the Hudson Valley v. Volpe*, 425 F. 2d 97, 106 (2d Cir.), *cert. denied*, 400 U. S. 949 (1970) (Corps required to prepare project-wide EIS now because both Congress and the Secretary of Transportation later will have to approve other portions of the state expressway project).

there are any significant impacts upon the environment. *See* 40 C. F. R. § 1500.6(b) (1978). Appellant argues that the administrative record does not reflect consideration of a secondary effect of granting the permit—namely, building the remainder of the line. If, however, appellant's position were correct, then an EIS for a properly segmented portion of highway would have to consider impacts of subsequent segments as well. A careful reading of the Council on Environmental Quality Guidelines, 40 C. F. R. § 1500.8(a)(3)(ii) (1978),[6] leads us to reject appellant's contention as erroneous. Completion of the nonfederal aspects of this single project does not constitute a secondary or indirect effect of the federal action.

B. *Alternatives.*

Appellant's second alleged deficiency in the administrative record is the absence of certain alternatives;[7]

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6 40 C. F. R. § 1500.8 (a) (3) (ii) provides in part:

> (ii) Secondary or indirect, as well as primary or direct, consequences for the environment should be included in the analysis. Many major Federal actions, in particular those that involve the construction or licensing of infrastructure investments (e. g., highways, airports, sewer systems, water resource projects, etc.), stimulate or induce secondary effects in the form of associated investments and changed patterns of social and economic activities. Such secondary effects, through their impacts on existing community facilities and activties, through inducing new facilities and activities, or through changes in natural conditions, may often be even more substantial than the primary effects of the original action itself. For example, the effects of the proposed action on population and growth may be among the more significant secondary effects.

7 The environmental assessment did consider three alternatives, including the no action option.

however, the Tribe did not allege this failure in its complaint, nor did the district court consider the claim in its memorandum opinion.[8] Because appellant failed to raise this issue to the trial court, we will not consider it as a basis for reversal. *See Morrow v. Greyhound Lines, Inc.*, 541 F. 2d 713, 724 (8th Cir. 1976), and cases cited therein. Furthermore, we conclude that our refusal to consider the issue would not result in "a plain miscarriage of justice," nor is it "inconsistent with substantial justice." Id.

C. *Potential Harm to Eagles.*

Finally, the Tribe claims it raised a substantial environmental issue concerning possible harm to bald eagles. The trial court summarized the evidence regarding eagles as follows:

> [F]irst, the Corps considered several different varities of birds in evaluating the area and concluded that there would be only short-term impacts resulting from the actual construction of the project, though some terrestrial habitats would be disturbed. Second, the Corps did not specifically consider the American bald eagle in its evaluation. Third, some eagles have been sighted in the area but there is no evidence that they nest in the area. Fourth, a small number[9] of eagles are electrocuted each year throughout the United States.

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8 At trial, the only discussion of other alternatives arose in response to the following question, posed by the Tribe's counsel: "[H]as the District, since this litigation began, considered any alternatives to solving this shortage if this line cant' be built?"

9 Dr. Louis Locke, a wildlife pathologist for the U. S. Fish and Wildlife Service, testified that approximately six percent of eagles necropsied between 1975 and 1977 had died of electrocution.

The trial court noted that there was no evidence establishing either that high powerlines affect eagles differently than the species of birds considered in the assessment, or that the existing OPPD powerline has detrimentally affected the bald eagles in the area. We hold that on the basis of this eviednce the trial court did not err in concluding that the Tribe failed to establish a significant environmental impact on eagles.

III. *Conclusion.*

The Tribe has failed to meet its burden of raising a substantial environmental issue omitted from consideration in the administrative record. Accordingly, we affirm the order of the trial court denying a permanent injunction.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS
EIGHTH CIRCUIT.

APPENDIX B

MEMORANDUM OPINION

(Filed June 28, 1979.)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

Civ. 79-0-158

WINNEBAGO TRIBE OF NEBRASKA,

Plaintiff,

vs.

COL. JAMES W. RAY, District Engineer, et al.,

Defendants.

This matter is before the Court in regard to the plaintiff's request for a permanent injunction. A temporary restraining order was issued on May 1, 1979. This Court, by agreement of the parties, proceeded on May 21, 1979, with a trial on the merits of the permanent injunction, at which time evidence and arguments were presented. The following memorandum constitutes the Court's findings of fact and conclusions of law in accordance with Rule 52 (a), Federal Rules of Civil Procedure.

The plaintiff, Winnebago Indian Tribe, seeks to halt the construction of a sixty-seven mile 345 KV transmission line which is proposed to run from the Iowa Public Service Company Raun substation in Iowa to Hoskins, Nebraska. The plaintiff has brought this action for alleged breach of the National Environmental Policy Act, 42 U. S. C. § 4321, *et seq.* (hereinafter NEPA). This Court has jurisdiction pursuant to 28 U. S. C. §§ 1331 (a), 1361,

1362, 2201 and 2202. Nebraska Public Power District (hereinafter NPPD), Iowa Public Service Company (hereinafter IPS), and the United States Army Corps of Engineers (hereinafter the Corps) have been named as defendants. The plaintiff has alleged that the environmental assessment performed by the Corps was insufficient in that the Corps failed to assess the environmental impact of this project upon American bald eagles and wrongfully limited its review to the river crossing segment rather than evaluating the impact upon the entire sixty-seven miles of the proposed line.

The two power companies agreed to share the cost of construction in the following manner: IPS financed and constructed the segment from the Raun substation crossing the Missouri River and ending on the west bank. NPPD is responsible for the financing and construction from the west bank to Hoskins, Nebraska, the major portion of the project. This proposed power line crosses the Missouri one hundred fifty feet south of another 345 KV transmission line owned by the Omaha Public Power District. The two lines run parallel for approximately three and one half miles. Since the span across the river was the obligation of IPS, it was incumbent upon them to acquire the necessary permits from the Corps.

In order to cross the Missouri, IPS sought a permit pursuant to Section 10 of the Rivers and Harbors Appropriation Act of 1899, 33 U. S. C. § 403. As mandated by NEPA, the Corps conducted an environmental review to ascertain the impact of the proposed construction on all aspects of the quality of the environment. IPS submitted environmental data to the Corps and upon this data

and an independent review, the Corps concluded that there were no significant environmental effects requiring an environmental impact statement (hereinafter EIS). A negative declaration to that effect was issued supported by an environmental effects assessment which briefly described the proposed construction, the probable environmental consequences, feasible alternatives and an explanation of the Corps' conclusion. The Corps did not specifically mention the presence of endangered species of birds such as the American bald eagle. In addition, the Corps' assessment was limited to a discussion of the environmental effects of the river crossing, but did not consider the remaining portion of the proposed line.

As stated above, the plaintiff has made two challenges to the "negative declaration" issued by the Corps. The plaintiff alleges that the Corps failed to evaluate the entire construction project and instead wrongfully narrowed their focus to the river crossing segment; secondly, the plaintiff alleges that the Corps failed to consider the environmental impact upon the American bald eagle, an endangered species.

A threshold issue is whether this privately financed and engineered project constitutes a major federal action. *Scientists' Institute for Public Information, Inc. v. Atomic Energy Commission,* 156 U. S. App. D. C. 395, 481 F. 2d 1079, 1088 (1973) expanded upon the phrase "major federal action" based upon a review of the legislative history and concluded as follows:

> Thus, there is "Federal action" within the meaning of the statute not only when an agency proposes to build a facility itself, but also whenever an agency makes a decision which permits action by other

> parties which will effect the quality of the environment. NEPA's impact statement procedure has been held to apply where a federal agency approves a lease of land to private parties, grants licenses and permits to private parties, or approves and funds state highway projects. (Footnotes omitted.)

Where Courts have construed the granting of a license for a permit to be "federal action," such permits have concerned an entire project and/or the foundational facets of a project. *See, e.g., Greenc County Planning Board v. F.P.C.,* 455 F.2d 412 (2d Cir.), *cert. denied,* 409 U.S. 849 (1972) (wherein an FPC permit concerned all aspects of the construction of hydroelectric transmitters and the generation of power therefrom.); *Calvert Cliffs' Coordinating Committee v. U.S.A.E.C.,* 146 U.S.App.D.C. 33, 449 F.2d 1109 (1971) (wherein atomic energy licensing and operating permits were in question). In cases where an agency has a lesser involvement, federal funding is necessary to bolster the federal nature of an action. As an example, in *Dalsis v. Hills,* 424 F.Supp. 784 (W.D. N.Y. 1976), a court considered whether the construction of an enclosed shopping mall constituted "major federal action." The court stated:

> A major federal action includes a decision of a federal agency which permits action to be undertaken by private parties which will effect the quality of the environment. (Citations omitted.) In the case at hand, HUD gave its approval with knowledge that a private developer would build the mall. This decision, *together with the funding* of the initial demolition of the substandard buildings, was sufficient to satisfy NEPA's "major federal action" prerequisite. (Emphasis supplied.) 424 F.Supp. at 787.

This analysis is in accord with the guidelines promulgated by the Counsel on Environmental Quality to aid federal

agencies with respect to their responsibilities under NEPA. At 40 C. F. R. 1500.6 (c), the guidelines provide:

> The action causing the impact must also be one where there is sufficient Federal control and responsibility to constitute "Federal action" in contrast to cases where such Federal control and responsibility are not present, as for example, where Federal funds are distributed in the form of general revenue sharing to be used by State and local governments (*see* Section 1500.5 (ii)).

In the instant case there is no federal funding for any aspect of the project and the permit issued by the Corps of Engineers concerns a technically minor aspect of the project when viewed in toto. It is true that the denial of a Section 10 permit would foreclose the project entirely because the two state power companies seek to link their operations and must, by necessity cross the Missouri River at some point. However, the Section 10 permit does not concern the nature of the project as a whole or the technical essence of the project. The plaintiff's assertion that this project is a "major federal action" in unfounded.

The fact that the project is not a "federal action" does not denegrate the responsibility of the Corps to determine whether an EIS must be performed in regard to the Section 10 permit. As stated above, the Corps issued a negative declaration stating that an EIS was unnecessary in regard to this particular Section 10 permit. The principles of judicial review in cases concerning a "negative declaration" by an administrative agency have been clearly and concisely set forth in *Pokorny v. Costle,* 464 F. Supp. 1273 (D. Neb. 1979), but bear repeating here. First, administrative agencies are responsible for the initial determination of whether an EIS is required under

NEPA. *Minnesota Public Interest Research Group v. Butz,* 498 F. 2d 1314, 1319 (8th Cir. 1974). Within the Eighth Circuit, the standard of judicial review for this determination is "one of reasonableness." *Minnesota Public Interest Research Group, supra; Monarch Chemical Works, Inc. v. Exon,* 452 F. Supp. 493, 500 (D. Neb. 1978); *Patterson v. Exon,* 415 F. Supp. 1276, 1281 (D. Neb. 1976). The burden of proof in cases challenging an agency's declaration is initially placed upon the plaintiff to demonstrate the deficiency in the administrative record exists. *Hiram Clarke Civic Club, Inc. v. Lynn,* 476 F. 2d 421, 425 (5th Cir. 1973); *Hiatt Grain and Feed, Inc. v. Bergland,* 446 F. Supp. 457, 490 (N. D. Ill. 1978).

The Court's inquiry is not limited to the allegedly deficient administrative record. After the plaintiff has demonstrated that an incomplete administrative record exists, the Court may consider extrinsic evidence in its evaluation of the reasonableness of a "negative declaration." In *Hiram,* the court stated:

> Rather, as we said in SOTA (Save Our Ten Acres v. Kreger, 472 F. 2d 463 (5th Cir. 1973)) only if a plaintiff raises substantial environmental issues should a court proceed to examine and weigh the evidence of both the plaintiff and the agency to determine whether the agency reasonably concluded that the particular project would have no effects that would significantly affect our environmental quality. Only if the plaintiff can show an inadequate evidentiary development before the agency should the District Court supplement the deficient administrative record by taking evidence on the environmental impact of the project. 476 F. 2d at 425.

The evidence presented at trial established that American bald eagles do frequent and roost in the area sur-

rounding the banks of the Missouri River, where the proposed Raun-Hoskins transmission line will cross, during the water fowl migratory periods of late fall and early spring. These birds nest in more northern areas of Minnesota and fly south during the harshest months of the winter. They feed on a variety of small animals and fish. Persons living in the area testified that they had sighted between fifty and eighty eagles during one season. Mark Haindfield, a park ranger for the past seven years at the Snyder Bend County Park near the area where the transmission lines cross the Missouri, stated that he had never observed any evidence of dead bald eagles in the area of the existing OPPD power lines and concluded that the additional construction would not propose any additional threats.

Doctor Louis Locke, a wildlife pathologist for the U. S. Fish and Wildlife Service, testified that he had performed or supervised the necropsy[1] of over three hundred bald eagles between 1963 and the present. Specimens of dead bald eagles are submitted to Doctor Locke's laboratories by special agents of the Fish and Wildlife Service whenever such specimens are found. In large part, the pathologists seek to define the cause of death for possible prosecution under the Bald Eagle Act. Of the birds necropsied between 1975 and 1977, Doctor Locke testified that approximately six per cent (ten eagles) were electrocuted, though he did not recall where in the country or how these accidents had occurred.

A threshold requirement in this Court's review of the issues presented here is whether the plaintiff has

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1 A necropsy is a post-mortem examination.

raised a "substantial environmental issue," *Hiram Clarke Civic Club, supra,* at 425. The plaintiff established four matters: first, the Corps considered several different varieties of birds in evaluating the area and concluded that there would be only short-term impacts resulting from the actual construction of the project, though some terrestrial habits would be disturbed. Second, the Corps did not specifically consider the American bald eagle in its evaluation. Third, some eagles have been sighted in the area but there is no evidence that they nest in the area. Fourth, a small number of eagles are electrocuted each year throughout the United States.

There has been no evidence concerning several issues crucial to this complaint. There has been no evidence that the area has been or will be designated as a critical habitat for the American bald eagle. There is no evidence that the American bald eagle is affected by the presence of high power lines in a manner different from other species of birds which were considered by the Corps. There has been no evidence concerning the manner in which birds are electrocuted by high power lines and whether such electrocutions normally occur in nesting areas or in roosting areas. In contrast, there has been credible evidence that the existing Omaha Public Power District line has not detrimentally affected the eagles roosting in the area to date.

In light of these critical omissions, this Court finds that the plaintiff has failed to present a substantial environmental issue requiring a reevaluation of a Section 10 permit by the Corps of Engineers. Accordingly, a separate order denying plaintiff's request for a perma-

nent injunction has previously been entered in conformity with this memorandum opinion.

By the Court:

/s/ Albert G. Schatz

Judge, United States District Court